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**(1988) 09 BOM CK 0029**

**In the Bombay High Court**

**Case No :** Criminal Application No. 1914 of 1988

Chand Mohamad Noor Mohamad

APPELLANT

Vs

Mohammed Faruk Mohamad Umarbhai and Others

RESPONDENT

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**Date of Decision :** 30-09-1988

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1), 439

**Citation :** (1989) 1 BomCR 201

**Hon'ble Judges :** A.D. Tated, J

**Bench :** Single Bench

**Advocate :** S.V. Marwadi, for the Appellant; V.S. Vanjara and K.R. Chavan for respondent No. 1 and P.M. Vyas, Assistant Public Prosecutor, for respondent No. 5-State, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

A.D. Tated, J.—This criminal application u/s 482 Cri.P.C. has been filed by one Chand Mohamad Noor Mohamad for quashing the order dated 19th September, 1988 passed by the Additional Chief Metropolitan Magistrate, 2nd Court, Mazgaon, Bombay [Shri S.A. Merchant], whereby he granted the application of the respondents Nos. 1 to 4- accused Nos. 1 to 4 for bail and directed that the said respondents be released on bail in the sum of Rs. 5,000/- each, with one surety in the like amount or a cash security deposit of 5,000/- plus P.R. in the sum of Rs. 5,000/- in lieu of the surety. Mr. P.M. Vyas, the learned Additional Public Prosecutor, supports the petition.

2. The facts giving rise to the application by the respondents Nos.1 to 4- accused Nos. 1 to 4 for releasing on bail have been stated by the learned Additional Chief Magistrate thus:-

"4. On 16-6-88 at about 6.45 P.M. the complainant's [that is, the petitioner's] father Noor Mohd. was assaulted by accused Nos. 2 and 4. According to him, accused No. 2 was having a knife with him, while accused No. 4 had a Khanjir

with him, as stated by him in his F.I.R. Noor Mohd, was assaulted by accused No. 2 and 4 with these weapons. Noor Mohd. was severely injured and he fell down on the road. It appears accused Nos. 2 and 4 continued to assault him. At that time accused Nos. 3 and 1 were seen running by the complainant with weapons in their hands towards the shop. At that time accused No. 1 was shouting that Noor Mohd. was assaulted and now his son Mansoor should not be spared. Thereafter it appears the complainant's brother Mansoor was also caught and he was assaulted by accused Nos. 3 and 1. They were having weapons like khanjir and kookery and with those weapons Mansoor was assaulted by them. The complainant seeing all this tried to intervene to save his brother Mansoor. At that time accused No. 1 picked up an iron bar which was lying nearby and with the same iron bar he gave a blow on the head of the complainant. Due to this, the complainant started feeling giddy and he sat down. All the accused persons ran away from the place. Thereafter it appears the injured Noor Mohd. and Mansoor and the complainant were removed to J.J. Hospital. Prior to admission Noor Mohd. and Mansoor were declared dead. The complainant Shri Chand Mohd. was treated in the hospital and later on his F. I. R. was recorded. The further investigation thereafter started. As mentioned in the charge-sheet, accused Nos. 1, 2 and 3 were arrested on 17-6-88, while accused No. 4 was arrested on 1-8-88. The accused No. 5 came to be arrested on 20-6-88."

(Bracketed portion supplied.) 3. The incident took place on 16th June, 1988 at about 6.45 p. m. The matter was reported to Dongri Police-Station, Bombay, at about 7.40 p.m. The police registered the crime for the offence u/s 302 read with section 34 I. P. C. and section 25(1)[b] read with section 27 read with section 35 of the Indian Arms Act, 1959, read with section 37(a) of the Bombay Police Act, 1951. As stated earlier, the respondents Nos. 1 to 4 accused Nos. 1 to 4 and the accused No. 5 were arrested. The weapons were recovered, the bloodstained clothes were seized from the person of the accused and after completing investigation charge-sheet was submitted in the Court of the learned Additional Chief Metropolitan Magistrate on 2nd September, 1988. The accused No. 5 was released on bail on 24th June, 1988 by the Metropolitan Magistrate, 15th Court, Mazgaon, Bombay. The accused Nos. 1 to 4 applied for their release on bail on 19th August, 1988. The prosecution opposed the bail application on the ground that the papers of investigation disclosed that the accused Nos. 1 to 4 committed an offence u/s 302 I. P. C. and as such they could not be released on bail by the learned Metropolitan Magistrate. It was also submitted before the learned Metropolitan Magistrate that there appeared reasonable grounds for believing that the accused were guilty of an offence of murder u/s 302 I.P.C. punishable with death or imprisonment for life and, therefore, the learned Metropolitan Magistrate had no jurisdiction to entertain the bail application and the accused could not be released on bail.

4. The learned Additional Chief Metropolitan Magistrate went through the police report, copies of the F.I.R. and statements of witnesses and the Panchnamas enclosed with the charge-sheet, and after considering all those papers he found

that the offence u/s 302 I.P.C. was not disclosed and that the offence alleged against the respondents Nos. 1 to 4---accused Nos. 1 to 4 could come within the ambit of the second part of section 304 I.P.C. Taking this view of the matter, he held that he had jurisdiction to entertain the bail application, and he passed the impugned order releasing the accused Nos. 1 to 4 on bail.

5. The reasoning of the learned Additional Chief Metropolitan Magistrate for holding that the offence alleged against the respondents Nos. 1 to 4 ---accused Nos. 1 to 4 could fall within the second part of section 304 I.P.C. appears in paragraph 8 of the order thus:-

"8. It is an admitted position that the injuries proved to be fatal and it [sic] resulted in the death of Noor mohd, [namely, the petitioner's father] and his son Mansoor [namely, the petitioner's brother]. According to him, it is not sufficient that the accused should only have the knowledge that injuries which he is inflicting will result in the death of the person whom he is assaulting. It is required to be established that those injuries are inflicted with intention that it should result into the death of the victims. As far as the offence of murder is concerned, it is also required to be proved prima facie by the prosecution that there was premeditation on the part of the accused persons. In absence of the intention and premeditation, the alleged act of the assailants in my opinion would come within ambit of section 304(II) of I.P.C. In the present case the F.I.R. and the statements (of witnesses) which I have scanned do not disclose any intention or premeditation on the part of the accused persons. As far as this aspect of the case is concerned, we may rely on some of the judgments of the Hon"ble Supreme Court. The first judgment that I would like to cite is 1979 C L J 1135 [SC] : Shankar alias Kallu Vs. State of Madhya Pradesh,

(Square bracketed portions supplied.) Thereafter the learned Additional Chief Metropolitan Magistrate extracted a passage from Shankar's case (supra) and also referred to the decision of the Punjab and Haryana High Court in Sampuran Singh and Others Vs. State of Haryana, . The learned Additional Chief Metropolitan Magistrate said that he was also quoting the judgment of the same Court, meaning thereby of the Supreme Court, but on seeing the law report I find that the decision in Sampuran Singh's case, relied on by the learned Additional Chief Metropolitan Magistrate, is not of the Supreme Court but is of the Punjab and Haryana High Court. I have gone through the decisions--one of the Supreme Court and the other of the Punjab and Haryana High court--relied on by the learned Additional Chief Metropolitan Magistrate and I find that they are not applicable to the facts of the present case. In Shankar alias Kallu Vs. State of Madhya Pradesh, , relied on by the learned Additional Chief Metropolitan Magistrate, death was caused on account of a dagger injury on the neck of the victim. On the prosecution case itself, the occurrence took place without any premeditation while the deceased along with the accused and others had just finished their meals. Under such circumstances, their Lordships of the Supreme Court observed that they did not think that the appellant had any intention of

causing the particular injury that he caused to the deceased with a dagger on the vital part of the body, namely, the neck. At the same time their Lordships found that the appellant must be deemed to have the knowledge that death might be caused by his act. On those facts and circumstances, it was held that the offence committed by the appellant was not u/s 302 I.P.C. but it fell under the second part of section 304 I.P.C. This decision is not at all applicable to the facts of the present case. Similarly, in Sampuran Singh and Others Vs. State of Haryana, , relied on by the learned additional Chief Metropolitan Magistrate, the occurrence took place at the spur of the moment. The appellants did not possess any lathi when the Panchayat proceedings started. All of a sudden, during the panchayat proceedings tempers of the appellants ran high when hot words were exchanged between one of the appellants (who was acquitted) and his brother and the meeting ended in a fiasee. Immediately thereafter the appellants picked up lathis from somewhere and caused three injuries on the head of the deceased, which proved fatal. The crime was committed without any premeditation. Under those circumstances, it was held that the appellants. Though they must be fixed with the knowledge that the blows were such as were likely to cause death, were not animated with the intention to cause death, and therefore, it was held that the offence fell within the second part of section 304 I.P.C. This case is also not applicable to the facts of the present case.

6. The learned Counsel for the petitioner contended that the law stated by the learned Additional Chief Metropolitan Magistrate at paragraph 8 of his order and reproduced above is not the correct law. According to him, in the present case all the five accused with sharp-edged weapons assaulted deceased Noor Mohamad and Mansoor and caused a large number of injuries. Some of the injuries were on vital parts and they were so serious that both of them succumbed to them before they could be admitted to the hospital. He submitted that taking into consideration the nature of the weapons with which those two persons were assaulted and the number of injuries sustained by them and some of them being on vital parts of the body and that the victims succumbed to those injuries before they could be admitted to the hospital clearly show that the offence that is made out is no less than the offence of murder punishable u/s 302 I.P.C. Even the learned Counsel Mr. Bhalchandra Mehta appearing for the respondents Nos. 1 to 4-accused Nos. 1 to 4 could not support the reasoning given by him at paragraph 8 of his order for holding that the offence under the second part of section 304 I.P.C. only can be established on the material on record.

7. The learned Counsel for the petitioner submitted that the respondent No. 1-accused No. 1 was carrying a kookery, the respondent No. 2 accused No. 2 had with him knife and the respondents Nos. 3 and 4 accused Nos. 3 and 4 had with them Khanjars and that the five eye-witnesses stated the involvement of the accused No. 1, and those witnesses were the petitioner, Abdul Rashid, Alibhai, Khurshid and Alan. He states that four witnesses, namely, Haji Noor Mohamad, Ganpat Gaurav, Palaji and the petitioner, stated the part played by the rest of the accused in assaulting the victims and causing the injuries found on their person.

When the learned Additional Chief Metropolitan Magistrate passed the impugned order, he did not have before him the post-mortem reports. Those post-mortem reports are now produced before me. The post-mortem report in respect of Noor Mohamad shows that there were as many as 12 injuries on his person and 8 out of them were incised wounds. The injury No. 7 was incised stab wound on right mid auxiliary line, 8.5 Cms. below right nipple, oblique, 2 Cm. x 0.5 Cm. x M.D. The external injury No. 7, as stated in the post-mortem report, has been described thus:

"Penetrate skin and muscles underneath. Haematoma (bruise) of 8th intercostal space on right side, one centimetre in diameter, on anterior auxiliary line, but no perforation on the intercostal space or fracture of rib. Depth :-2 to 3 Cms,"

The internal injury corresponding to external injury No. 8 in the post-mortem report has been described thus:

"Perforate skin and muscles underneath.

Penetrate peritoneum.

Perforate mesentry.

Perforate ascending colon upper part through and through, entry 2 cms. x 0.5 cm.,

exit 1.6 cms. x 0.5 cm.

Penetrate ileum 80 cms. away from jejunoileal junction, 0.5 cm, x 0.4 cm. with perforation mesentry and injured mesentric blood vessels, nerves.

Depth :- 10 to 11 cms."

The injuries on the scalp and the skull are described in the post-mortem report as follows :

"Haematoma under scalp of right side front parietal and right temporal and right occipital area with contusion of scalp, with haemorrhage/haematoma right temporalis muscle which also cut under external injuries Nos. 2 and 3.

(a) Cut outer table of right parietal bone, one centimetre away from biparietal suture, 4 Cms. in length.

(b) Cut right parietal temporal bone (corresponding to external injury No. 2) oblique, 8 Cms. x 1 Cm.

(c) Cut right parietal temporal bone [corresponding to external injury No. 3], 5 Cms. x 1 Cm., opposing the above cut at [b].

(d) Crack fracture of right temporal bone into right middle cranial fossa, extends to left side anterior cranial fossa, passing 2 Cms. above pituitary fossa. Also crack fracture of right anterior cranial fossa, communicates to this fracture, 2 Cms. above pituitary fossa in centre."

The probable cause of death has been stated as head injury following incised chop wounds.

8. The post-mortem report of Mansoor shows that he had as many as 14 external injuries, out of which 10 were incised wounds. The external injury No. 3 is incised wound on right side chest, 5 cms. away from midline, 1.2 cms. away from manubrium, oblique, 2.5 cms. x 0.5 cm. The upper and medial angle acute, while lower and lateral angle obtuse (rounded)." Corresponding to this external injury, the internal injuries are described thus:-

"Perforate skin and muscles underneath. Perforate 1st intercostal space on right side chest with cut on the 2nd rib costal cartilage.

Perforate right pleura.

Perforate right lungs, upper lobe medially.

Perforate superior vena cava.

Perforate penetrate arch of aorta on right side.

Depth :--8 to 9 Cms.

Direction :--Below upwards medially and backwards."

In the post-mortem report the other external injuries and corresponding internal injuries have been fully stated. It is not necessary to reproduce them. The probable cause of death as mentioned in the post-mortem report, is "Haemorrhage and shock due to stab injuries of chest, involving vital organs, by a sharp edged weapon/s [unnatural]." Taking into consideration the nature of the weapons, the number and the extent of injuries and the vital parts involved and damaged and that the victims succumbed to death soon after the assault clearly bring the offence within the provisions of section 300 I.P.C..

9. A similar question arose before the Division Bench of this Court (to which I was a party) in Criminal Appeal No. 1016 of 1980, State of Maharashtra v. Arun Savalaram Pagare, decided on 5th, 9th and 10th August, 1988. In that case the accused has killed his wife by infliction as many as seven incised wounds with knife, and the learned Additional Sessions Judge, Greater Bombay, held that the offence committed did not fall u/s 302 I.P.C. but it did fall under the second part of section 304 I.P.C. This Court, on considering the evidence and the nature of the injuries, found that the learned Additional Sessions Judge was not right in acquitting the respondent accused of the offence u/s 302 I.P.C. and in reducing the offence to one punishable under second part of section 304 I.P.C. After considering the decisions of the Supreme Court in Virsa Singh Vs. The State of Punjab, and Rajwant Singh and another v. State of Kerala AIR 1966 S.C. 1874, this Court held that applying the tests laid down by their Lordships of the Supreme Court in the above two decisions, in that case the prosecution satisfactorily proved that the accused did cause the injuries found on the person of deceased Bharati, that the accused intentionally inflicted those injuries and

that the injuries were sufficient in the ordinary course of nature to cause death and death was actually caused. Therefore, the requirements of Thirdly of section 300 I.P.C. were fully satisfied and the offence committed was that of murder punishable u/s 302 I.P.C. The facts of the present case are more telling and serious than the facts in the said Criminal Appeal No. 1016 of 1980. The two victims were assaulted by four accused persons with sharp-edged weapons which they were carrying with them and the injuries inflicted are large in number and some of those injuries were on vital parts and they appeared to be sufficient in the ordinary course to cause death and the deaths of both the victims were actually caused immediately after the incident. Therefore, prima facie, the ingredients of section 300 I.P.C. are satisfied and in no circumstance the learned Additional Chief Metropolitan Magistrate, on the facts of the case, at the threshold, could say that the offence u/s 302 I.P.C. is not prima facie made out and that on the facts of the case the offence could fall only within the second part of section 304 I.P.C. Therefore, in the circumstances of the present case, the learned Additional Chief Metropolitan Magistrate could not have held that there did not appear reasonable grounds for believing that the respondents Nos. 1 to 4-accused Nos. 1 to 4 and the accused No. 5 committed an offence punishable with death or imprisonment for life. On the facts of the present case as disclosed from the prosecution papers, there did appear reasonable grounds for believing that the accused had been guilty of an offence punishable with death or imprisonment for life. When that is the case, the learned Additional Chief Metropolitan Magistrate could not have entertained the bail application u/s 437(1) Cri.P.C. and could not have released the accused Nos. 1 to 4 on bail. The learned Additional Chief Metropolitan Magistrate assumed jurisdiction to entertain the bail application by wrongly finding that the offence disclosed was under the second part of section 304 I.P.C., which was not punishable with death or imprisonment for life.

10. It may be mentioned that it is not that in every case involving a non-bailable offence which is not punishable with death or imprisonment for life that the bail should, as a rule, be granted to the accused. His Lordship Mr. Justice M.B. Shah of the Gujarat High Court in *The State of Gujarat v. Lalji Popat and others* (1988)17 G L R 393 after considering the decisions of the Supreme Court in *Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another*, , *The State Vs. Captain Jagjit Singh*, ; *Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh*, ; *State (Delhi Administration) Vs. Sanjay Gandhi, Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another*, and *Bhagirathsinh Judeja Vs. State of Gujarat*, culled out the following relevant factors to be taken into consideration for deciding a bail application at pages 400 and 401 of the reports thus :--

"[1] The nature of the charge is the vital factor and the nature of evidence is also pertinent.

[2] The punishment to which the accused may be liable if convicted.

[3] While considering the question of granting bail u/s 439(1), Cri.P.C. the Court should take into consideration provisions of section 437(1) inspite of the fact that u/s 439(1) the High Court and Sessions Court have wide jurisdiction to grant bail.

[4] The nature and gravity of the circumstance in which the offence is committed say/highway robbery or dacoity, gang rape, murder or murders because of group rivalry, attack by one community on other community or such other cases.

[5] The position and the status of the accused with reference to the victim and the witnesses, say, in case of burning of housewife, witnesses may be neighbours, there evidence might be tampered with by any means.

[6] The reasonable possibility of the presence of the accused not being secured at the trial.

Merely because the accused is the owner of large property, movable or immovable, would be no ground to presume that the presence of the accused would be secured at the trial by granting him bail. For this purpose the charge, the nature of evidence by which it is supported and the punishment to which the party would be liable, if convicted, are to be taken into consideration. In cases of highest magnitude of punishment assigned under the law the Court can reasonably presume that no amount of bail was sufficient to secure the presence of convict at the stage of judgment. In some cases accused may leave the country or go underground in such a manner that it becomes difficult to trace him out.

[7] Any likelihood of tampering with the witnesses.

This also depends on the seriousness of the offence and the nature of evidence. In serious offences if the accused are released on bail, they would be tempted to tamper with the evidence by hook or crook. Therefore, the position and the status of the accused with reference to the victim and the witnesses and the events leading to the incident and the history of the accused are required to be taken into consideration. As observed by the Supreme Court, in regard to the habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society.

[8] Jeopardising his own life being faced with the grime prospect of possible conviction in the case.

[9] The prospect of victim or his relatives indulging in private retribution who feel helpless and may believe that law may not protect them.

[10] The larger interests if public, society or the State.

[11] Similar other circumstances depending on facts and peculiarity of each case."

I fully agree with the learned Judge of the Gujarat High Court that the above

factors should be taken into consideration while granting bail to the accused involved in serious non-bailable offences. In the present case the learned Additional Chief Metropolitan Magistrate only took into consideration that the offence likely to be proved against the respondents Nos. 1 to 4-accused Nos. 1 and 4 and the accused No. 5 is the offence under the second part of section 304 I.P.C. and on that ground alone he has released them on bail.

11. It is true that the inherent powers of this Court u/s 482 Cri.P.C. are to be sparingly used, but when the Court finds that there has been a gross abuse of the process of the Court or that there has been failure of justice due to the palpably wrong order of the Court below, it is necessary for this Court, in order to secure the end of justice, to set aside such order. The impugned order granting bail to the respondents Nos. 1 to 4-accused Nos. 1 to 4 passed by the learned Additional Chief Metropolitan Magistrate is patently wrong and is likely to cause failure of justice, and, therefore, it is necessary to secure the ends of justice by setting aside the same.

12. In the result, the application is allowed, the impugned order of the learned Additional Chief Metropolitan Magistrate is hereby set aside and the rule is made absolute. The writ shall be immediately issued.